(2)

No. 90-681

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

BARBARA HAFER,

Petitioner,

vs.

JAMES C. MELO, JR. AND
CARL GURLEY, ET AL.,

Respondents.

ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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1. May the victim of a civil rights violation committed by an elected state official sue the official in the official's personal capacity for monetary damages under 42 U.S.C. 1983?

2. Does such a suit violate the Eleventh Amendment to the Constitution of the United States?

COUNTERSTATEMENT OF THE CASE

The proceedings in the Court of Appeals arose from what was originally 11 separate law suits filed in the District Court. These original 11 law suits were then consolidated in the District Court into two cases, *Melo* and *Gurley*. Both the *Melo* and the *Gurley* cases were dismissed by the District Court in one joint Order. Both cases were then consolidated in the Court of Appeals and were adjudicated in one Opinion.

Because the District Court directed the defendants to file Motions for Summary Judgment before completion of discovery and because the District Court's Opinion was based solely upon the allegations on the face of the Complaint, the Court of Appeals treated the District Court's Order as one granting a Motion to Dismiss the Complaint. Accordingly, the "facts" before the Court of Appeal were the facts alleged in the *Melo* and *Gurley* Complaints. (A. 9-12). These "facts", as recited by the Court of Appeals, were as follows:

1. Defendant Barbara Hafer was elected Auditor General of Pennsylvania in November of 1988. She defeated the incumbent, Donald Bailey. (A. 4-5).

2. During her election campaign, Hafer stated that she had received a list of 21 employees in the Auditor General's Department who allegedly bought their jobs and that, if elected, she would fire all employees on the list. (A. 4-5).

3. On February 1, 1989, Hafer fired 18 employees whose names were on the list, including the 8 Melo plaintiffs. She stated that her reason for firing these employees was that they were involved in a job-buying scheme. Hafer also stated to a reporter that the 18 employees whom she fired had paid up to $5,000.00 for their jobs and this statement appeared in a newspaper on February 2, 1989. (A. 5).

4. On February 21, 1989, Hafer fired the Gurley plaintiffs without explanation. All of the Gurley plaintiffs had been supporters of Bailey in the November 1988 election. (A. 6).[1]

5. The Melo plaintiffs sought only monetary damages, both compensatory and punitive. Two of the Gurley plaintiffs also sought only monetary damages. Six of the Gurley plaintiffs also requested prospective non-monetary relief in the form of reinstatement *without* retroactive pay. (A. 6).

6. The Melo and Gurley Complaints allege causes of action against Hafer but not the Commonwealth of Pennsylvania. The Complaints did not allege that Hafer was an employee or agent of the Commonwealth of Pennsylvania. (A. 30-43). The Commonwealth did not receive notice of the suits nor was the Commonwealth given an opportunity to respond. (A. 44-49). No monetary damages were sought from the Commonwealth. The Complaints did not allege that the Commonwealth was the moving force behind the deprivation of the plaintiffs' civil rights or that the Commonwealth's policy or custom played a part in the civil rights violation. (A. 30-43). Hafer asserted the personal immunity defense of qualified immunity in her Answers to the Complaints. (A. 56). Both the Melo and the Gurley plaintiffs stated to the District Court that they were suing Hafer in her individual capacity. (A. 14, 15).

7. The Court of Appeals was satisfied that all plaintiffs had adequately explained to the District

1. Hafer's statement at Page 3 of her Brief that the Gurley plaintiffs were "terminated as part of a management overhaul of the Department" is incorrect. No such allegation was made in the Gurley Complaints or considered by either the District Court or the Court of Appeals.

Court that their claims for monetary damages were asserted against Hafer in her individual capacity only. (A. 14, 15). Hafer is incorrect when she states at Page 5 of her Petition that the "principal basis" for the decision of the Court of Appeals was that only six of the eight Gurley plaintiffs expressly asserted claims for monetary damages against Hafer in her "personal capacity".

ARGUMENT

I. A STATE OFFICIAL IS A "PERSON" WITHIN THE MEANING OF 42 U.S.C. 1983 WHEN SUED FOR MONETARY DAMAGES IN THE OFFICIAL'S INDIVIDUAL CAPACITY

In *Will vs. Michigan Department of State Police*, 109 S.Ct. 2304 (1989), this Court held that a state was not a person under 42 U.S.C. 1983. The defendants in *Will* were the Michigan Department of State Police and the Michigan Director of State Police "in his official capacity". Mr. Will did not sue any individual in a personal capacity. Instead, he sued an administrative agency (Department of State Police) and the head of that agency "in his official capacity". The Director of State Police was not sued in a personal capacity nor does it appear that any damages were sought from him personally. Damages were sought from the public treasury and therefore the state (Michigan) was the true party in interest. Citing *Kentucky vs. Graham*, 473 U.S. 159, 105 S.Ct. 3099 (1985) and *Brandon vs. Holt*, 469 U.S. 464, 105 S.Ct. 873 (1985), Mr. Justice White stated:

> "Obviously, state officials literally are persons. But a suit against a state official *in his or her official capacity* is not a suit against the official but rather is a suit against the official's office. *Brandon vs. Holt*, . . . As such, it is no different from a suit against the State itself. See e.g., *Kentucky vs. Graham*, . . . " (Page 2311) (Emphasis supplied)

A civil rights suit against the "state itself" seeks money from the public treasury and would permit a federal court to dictate the disposition of state tax revenues. Such a situation was repugnant to Congress when it enacted 42 U.S.C. 1983. Mr. Justice White went on to state in *Will* that:

> "Although there were sharp and heated debates, the discussion of Section 1 of the Bill, which contained the present Section 1983, was not extended. And although in other

> respects the impact on State sovereignty was much talked about, no one suggested that Section 1 would subject the states themselves to a damage suit under Federal law. *Quern*, 444 U.S. at 343. . . . There was complaint that Section 1 would subject state officers to damage liability, but no one suggested that it would also expose the states themselves. *Cong. Globe*, 42d Cong., 1st Sess. 366, 385 (1871)." (Page 2310)

The Melo and Gurley plaintiffs seek monetary damages from Hafer only in her personal capacity. No monetary damages have been sought from the Commonwealth of Pennsylvania. Therefore, these claims do not subject Pennsylvania to a damages suit under federal law or threaten an invasion of a state public treasury.

All of the factors cited in *Kentucky vs. Graham*, supra, to show that a suit is a personal capacity and not an official capacity suit are present in the instant case. For example:

1. Personal capacity suits seek to impose personal liability upon a government official for actions taken under color of state law. Official capacity suits, in contrast, plead an action against an entity of which the officer is merely an agent. In the instant case, plaintiffs did not plead an action against the Commonwealth of Pennsylvania or allege that Hafer was an agent of the Commonwealth of Pennsylvania.

2. An official capacity suit is one where the government entity receives notice and an opportunity to respond. Plaintiffs did not serve the Commonwealth or the State Attorney General with a copy of the Complaint or request that the Commonwealth respond to the Complaint because the Commonwealth was not a party. Further, Hafer was represented by private counsel and not the Pennsylvania Attorney General's Office.

3. In an official capacity suit, damages are sought from the government entity itself and the entity is the real party in interest. In a personal capacity suit, an award of damages would be executed only against the official's personal assets. In the instant case, plaintiffs' claims for damages are made only against Hafer and her personal assets.

4. To establish the merits of a personal liability action, plaintiffs need only show that the official, acting under color of state law, caused a deprivation of a civil right. In an official capacity suit, plaintiff must show that the entity itself was the moving force behind the deprivation and that the entity's policy or custom played a part in the violation of federal law. In the instant case, plaintiffs did not plead that the Commonwealth was a moving force behind the deprivation or that the Commonwealth's policy or custom played a part in the violation of federal law.

5. In a personal capacity suit, the defendant may assert personal immunity defenses such as qualified immunity. Hafer did assert such a defense in her Answers to the Complaints.

In *Brandon vs. Holt*, 469 U.S. 464, 105 S.Ct. 873 (1985), this Court held that it was for the plaintiff to identify whether the suit was personal or official and whether the claim was asserted against the office or the particular person who held the office. In that way, the Court could determine the real party in interest, i.e., the public treasury or private purse. The Court further stated that it was not necessary that the identification be made in the Complaint as long as it became clear in the course of proceedings whether plaintiff was proceeding against the person or the office. In *Brandon*, it was made clear at least at the summary judgment stage that plaintiff was proceeding against the office and the Court adjudicated the case on that basis

even though a subsequent amendment to the pleadings might be necessary. In the instant case, plaintiffs did explain to the District Court that they had sued Hafer for damages in her individual capacity. (A. 16). Therefore, the case should have been adjudicated on that basis.

In summary, the essential reason why a state is not a person for a 1983 suit for damages is that Congress intended that the federal courts be the primary forum for vindication of civil rights violations and that Congress found it abhorrent for the federal judiciary to dictate the disposition of state treasury funds. However, where state treasury funds are not at issue, i.e., where a state official is sued in an individual capacity, there is no impediment to a suit under 42 U.S.C. 1983 against a "person" who happens to be a state official.

II. THE ELEVENTH AMENDMENT DOES NOT BAR A PERSONAL CAPACITY SUIT AGAINST A STATE OFFICIAL

The Court in *Will vs. Michigan,* supra, drew heavily upon cases interpreting the Eleventh Amendment in reaching the conclusion that 42 U.S.C. 1983 would not permit suits for monetary damages where the state was the real party in interest. The basic concern was the same, i.e., federal courts should not dictate the disbursement of state public treasury funds. Therefore, as long as a money judgment would be paid from a private purse and not a state public treasury, the Eleventh Amendment does not bar a personal capacity suit under 42 U.S.C. 1983.

CONCLUSION

The Third Circuit Court of Appeals correctly determined that on the basis of the facts alleged in the Melo and Gurley Complaints, plaintiffs stated valid personal capacity suits against Hafer under 42 U.S.C. 1983 to recover monetary damages and that the fact that plaintiffs were proceeding against Hafer in her personal capacity was made abundantly clear to the District Court. Therefore, a Writ of Certiorari to review the Judgment Order of the Third Circuit should be denied.

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Filed August 21, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1924

JAMES C. MELO, JR.
LOUISE JURIK
DONALD RUGGERIO
KAROL DANOWITZ
JAMES DICOSIMO
LUCILLE RUSSELL
WALTER W. SPEELMAN
JOHN WEIKEL,

Appellants

v.

BARBARA HAFER and JAMES J. WEST

No. 89-1925

CARL GURLEY
W. GERARD BEST
MICHAEL BRENNAN
MARGARET CASPER
ELIZABETH BUCHMILLER
DANIEL CLEMSON
MARY FAGER
GEORGE A. FRANKLIN, JR.

Appellants

v.

BARBARA HAFER

Appeals from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Nos. 89-2935 & 89-2685)

Argued March 16, 1990

Before: SLOVITER, BECKER and STAPLETON,
Circuit Judges

(Filed: August 21, 1990)

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OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

I.

Introduction

This is an appeal from the district court's dismissal of two civil rights actions. In the action with Carl Gurley as the lead plaintiff, eight terminated employees assert a claim under 42 U.S.C. § 1983 alleging that their discharge by Barbara Hafer, the Auditor General of Pennsylvania, was political and therefore violated their due process and First Amendment rights. In the action with James C. Melo as the lead plaintiff, eight other terminated employees, who similarly allege a violation of their civil rights by Hafer, further allege that Hafer and James West, the acting United States Attorney for the Middle District of Pennsylvania, conspired to deprive them of their civil rights. The Melo plaintiffs also assert state law claims against West.

This appeal requires us to consider whether a claim for monetary relief brought under 42 U.S.C. § 1983 may be maintained against a state official in her individual capacity, whether a claim under the same statute may be maintained against a federal official when he is alleged to have conspired with a candidate for state office, and whether a

scope of employment certification issued by the government in a claim brought under the Federal Tort Claims Act is reviewable.

II.

Facts and Procedural History

The eight plaintiffs whose complaints were consolidated into the Melo action allege that they were employed in various capacities through January 1989 in the Pennsylvania Auditor General's Office, during which time they had compiled satisfactory work records. The complaints allege that sometime after John Kerr, a former employee in the Auditor General's Office, admitted that he received payments to influence either hiring or promotion decisions for 21 employees in the Auditor General's Office, acting United States Attorney West provided a list of the 21 employees to Donald Bailey, the then-Auditor General, in a confidential letter dated on or about January 21, 1988. The letter stated that "[w]e can express no opinion on whether these listed individuals knew of the purchase of their job" and it contained the request "that you keep these names strictly confidential, not use them for any type of media disclosures other than necessary to appropriate administrative proceedings, and make them available only to your most trusted employees on a need-to-know basis." Melo App. at 11. Bailey subsequently conducted an investigation of the 21 employees through his Chief Counsel, James L. McAneny, and McAneny concluded that the Melo plaintiffs committed no wrongdoing nor were they aware of any wrongdoing committed on their behalf.

On or about April 30, 1988, Hafer was nominated as the Republican candidate for Auditor General and Bailey, the incumbent, was nominated as the Democratic candidate. The complaints allege that the Melo plaintiffs were registered Democrats and West was a registered Republican. They allege that during the election campaign

between Hafer and Bailey, West provided Hafer with a copy of the letter he sent to Bailey and advised Hafer that the 21 employees on the list "bought their jobs"; that West was "motivated by a desire to assist [Hafer] in the November, 1988 election and to create and/or foster a campaign issue that favored Ms. Hafer"; and that West provided the list with "a knowledge, understanding and expectation that . . . Ms. Hafer, if elected, would fire all of the people on the list." Melo App. at 13. Hafer allegedly stated on numerous occasions during the campaign that she received the "jobs-bought" list from West and that, if elected, she would fire all employees on the list.

Hafer was elected as Auditor General in November 1988. According to the complaints, on February 1, 1989, Hafer, without conducting any additional investigation to determine the alleged involvement of the Melo plaintiffs in the job-buying scheme, fired 18 employees whose names appeared on the "jobs bought" list, including all eight Melo plaintiffs. In her letters terminating the Melo plaintiffs' employment, Hafer stated that the dismissal was "necessary based on information gathered by my office as well as through cooperation with other governmental agencies as a result of an investigation of your involvement in a job buying and/or a job promotion scheme in the Auditor General's Office." Melo App. at 14. The Melo plaintiffs allege that Hafer did not follow the provisions in the Auditor General's Policy and Procedure Manual, in effect since on or about January 1986, which includes procedural protections and a "just cause" requirement for dismissals.

The complaints also allege that an article in the February 2, 1989 edition of the Patriot-Capital News quoted both Hafer, as stating that she was firing 18 employees who had paid "up to $5,000 each for their jobs under a previous administration," and West, as stating that "he appreciated Ms. Hafer's definitive action in firing the eighteen employees."

The factual allegations and legal claims against Hafer alleged by the Gurley plaintiffs are similar to those made by the Melo plaintiffs. The Gurley plaintiffs allege that they had been continuously employed at the Auditor General's Office in various capacities until February 21, 1989 and had performed their work satisfactorily; that all but one of them were registered Democrats; that all had been supporters of Bailey in the November 1988 election for Auditor General; and that on February 21, 1989, Hafer discharged them without explanation. Unlike the Melo plaintiffs, they have not sued West and make no allegations as to him.

The claims made by the plaintiffs under 42 U.S.C. § 1983 are that their firing by Hafer deprived them of their right to procedural and substantive due process and interfered with their First Amendment freedom of political association. The Melo plaintiffs also allege that Hafer and West engaged in a conspiracy to deprive them of due process and equal protection of the law, and they include the state law claims against West of defamation and interference with contractual relations. Each Melo plaintiff requests $2 million in compensatory damages, $1.5 million in punitive damages, and reasonable attorneys' fees stemming from the alleged violations of their civil rights. They do not request any form of injunctive relief. Each Gurley plaintiff requests $500,000 in compensatory damages and $500,000 in punitive damages. Six of the Gurley plaintiffs also request reinstatement without back pay.

The procedural sequence of events is relevant to an understanding of the nature of the district court's disposition. The complaints were filed in April and May of 1989. Hafer filed her answers on June 14, 1989.[1] On July 6, 1989,

1. On June 27, 1989, the Melo plaintiffs filed a protective action in state court against both Hafer and West incorporating by reference both the federal and state claims in their federal complaint. This action was removed by West to the Eastern District of Pennsylvania under 28 U.S.C. §§ 1441(a) and 1442(a)(1) on July 19, 1989 and consolidated with the Melo action. The Melo plaintiffs filed a motion to remand.

the district court ordered both the Melo and the Gurley plaintiffs to submit joint discovery schedules by July 12, 1989, not to exceed beyond September 28, 1989. However, on July 14, 1989, the court deferred the filing of a joint discovery schedule and ordered Hafer to submit her motion for summary judgment by August 9, 1989. The court consolidated the actions on July 18. West moved to stay discovery in the Melo actions on July 20, but the district court never acted on this motion.

On July 28, 1989, West filed a motion in the Melo action to dismiss or, in the alternative, for summary judgment, contending, *inter alia*, that the Melo plaintiffs' section 1983 claim was barred because they had not alleged facts sufficient to establish a conspiracy between Hafer and West whereby he was acting under color of state law. Concurrently, the Director of the Torts Branch of the Department of Justice filed a certification pursuant to 28 U.S.C. § 2679(d)(1), stating that "[o]n the basis of information presently available with respect to the occurrences referred to therein, defendant James J. West at all times relevant was acting within the scope of his employment as an employee of the United States." Melo App. at 195. The government also filed a motion to substitute itself for West on the Melo plaintiffs' state law claims of defamation and contractual interference, again pursuant to 28 U.S.C. § 2679(d)(1), and thereafter to dismiss these claims on the ground that under 28 U.S.C. § 2680(h) the government had not waived its sovereign immunity for claims for defamation and contractual interference.

On August 9, 1989, Hafer filed a consolidated motion for summary judgment against both the Melo and Gurley plaintiffs, contending, *inter alia*, that because she was sued

only in her official capacity, the plaintiffs' claims were barred by the Eleventh Amendment, and further contending that the plaintiffs had not stated a claim for conspiracy. The Melo plaintiffs, in response to West's motion for summary judgment or dismissal, argued that the court should allow a continuance of discovery pursuant to Federal Rule of Civil Procedure 56(f), as they had no personal knowledge of what transpired between West and Hafer and would therefore not be able to submit affidavits based on the "personal knowledge" of the affiants in order to oppose the motion for summary judgment. Attached to the response was a declaration of James C. Melo to that effect. Again, in their joint response to Hafer's motion for summary judgment, the plaintiffs stated that they did not have adequate time to conduct discovery, although they did not attach the affidavit thereto.

In three separate orders issued on September 28, 1989, the district court granted Hafer's motion for summary judgment, granted the government's motion to substitute itself for West and to dismiss the Melo plaintiffs' state tort claims, and declared as moot West's motion for summary judgment. On the same day the court denied as moot the Melo plaintiffs' motion to remand the case that had been removed from state court. *See* note 1 *supra*.

In a subsequent opinion, the court explained its orders. It held that the plaintiffs' section 1983 claims were barred because they had sued Hafer in her official capacity and that she was not a "person" for purposes of section 1983. The court held that the Melo plaintiffs had not alleged facts showing that the alleged conspiracy between Hafer and West involved some racial or other class-based discriminatory animus, and that therefore their claim based on equal protection, if treated as filed under 42 U.S.C. § 1985(3), failed. Finally, the court held that substitution of the government for West as a defendant to the Melo plaintiffs' state law claims was "necessitated" by the Federal Tort Claims Act in light of the government's certification that West was acting within the scope of his employment, and that those claims were then dismissed because claims against the United States for defamation and contractual interference are expressly excluded under 28 U.S.C. § 2680(h) from the sovereign immunity waiver in the Federal Tort Claims Act.

Both the Melo and the Gurley plaintiffs filed timely notices of appeal, which we have consolidated for our review. We have jurisdiction over the district court's final orders pursuant to 28 U.S.C. § 1291.[2]

III.

Discussion

A.

Standard of Review

At the outset, we must consider what material is appropriately before us. The district court dismissed the action against West but denominated the dispositive order as to Hafer as the grant for summary judgment for Hafer. We have previously held that the label used by a district court, albeit indicative, " 'is not binding on a Court of Appeals.' " *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 443 (3d

2. Hafer had counterclaimed against the Melo plaintiffs for fraud and conspiracy to commit fraud. Thereafter, the district court adopted the parties' stipulation that Hafer's counterclaims were dismissed without prejudice, with the right to reinstate them at a later date should we reverse the district court's grant of summary judgment. In response to this court's inquiry into the effect on our jurisdiction of the dismissal of the counterclaim without prejudice, Hafer notified this court by letter memorandum that she is abandoning the counterclaim and will not reassert it in the district court in the event that we remand this action for further consideration. Therefore, there is no impediment to the exercise of our appellate jurisdiction at this time.

Cir. 1977) (quoting *Tuley v. Heyd*, 482 F.2d 590, 593 (5th Cir. 1973)), *cert. denied*, 434 U.S. 1086 (1978); *see also Rose v. Bartle*, 871 F.2d 331, 340 (3d Cir. 1989). Rather, we must "look to the course of the proceedings and basis for decision in the district court" to determine our standard of review. *Bogosian*, 561 F.2d at 443. If the district court dismisses an action for failure to state a claim on the face of the pleadings on a motion for summary judgment, "a motion so decided is functionally equivalent to a motion to dismiss" and we must review it accordingly. *Id.* at 444; *see also* 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 56.02[3], at 56-33 to 56-34 (2d ed. 1988).

The plaintiffs contend that we should not consider any discovery materials extraneous to the complaint, as they did not have an opportunity to complete discovery and the district court in fact disposed of the actions based on the face of the complaint. Hafer and West, on the other hand, argue that the plaintiffs had an adequate time to conduct discovery and we should therefore determine whether they are entitled to summary judgment based on the factual record compiled during discovery.

Although the parties have engaged in some discovery and have submitted a variety of documents external to the complaints and their answers, we conclude that we must review the district court's action as one granting a motion to dismiss. The district court's memorandum opinion makes no reference to any of the materials submitted by the parties that were extraneous to the pleadings. It is clear that the court's action rested solely on the failure of the allegations on the face of the complaint to state claims against Hafer and West. *See Bogosian*, 561 F.2d at 444 (district court order should be treated as one dismissing complaint for failure to state a claim because it "excluded everything but the complaint in granting the motions").

Furthermore, the district court's July 14, 1989 order

deferred the filing of a joint discovery schedule and ordered Hafer to submit her motion for summary judgment by August 9, 1989. Although this order did not technically prohibit the parties from engaging in further discovery, it could reasonably have deterred further discovery by plaintiffs. Certainly the order demonstrates that the court was willing to consider the defendants' dispositive motions without a complete factual record developed during a defined discovery period.

The plaintiffs' objections to proceeding with summary judgment were called to the district court's attention by the Melo plaintiffs in their response to West's motion. They sought to comply with Rule 56(f) through the declaration by Melo[3] in which he stated that "neither I nor the other plaintiffs would have personal knowledge of [West and Hafer's communications during the 1988 election]" and requested that the court grant a continuance of discovery until "counsel has had an opportunity to examine under oath the defendants, Mr. Bailey and all other persons who

3. Rule 56(f) provides in pertinent part that

> [s]hould it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

Fed. R. Civ. P. 56(f). We express no opinion as to whether the Melo declaration satisfies the Rule 56(f) requirements previously enunciated by this court. *See* Lunderstadt v. Colafella, 885 F.2d 66, 71-72 (3d Cir. 1989) (quoting Dowling v. City of Philadelphia, 855 F.2d 136, 140 (3d Cir. 1988)) ("[A] Rule 56(f) motion must identify with specificity 'what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained.' "). Nor do we express an opinion as to the effect of the failure to attach the Melo declaration to the plaintiffs' response to Hafer's motion for summary judgment.

have knowledge of the matter." Melo App. at 111, 112. The district court's failure to rule on the Melo plaintiffs' request for a continuance of discovery, as well as its failure to rule on West's motion for a protective order, suggests that the court considered the discovery issue irrelevant for purposes of its decision.

Because we treat the district court's orders as granting a motion to dismiss, we must determine whether, in accepting as true the factual allegations in the Melo and Gurley plaintiffs' complaints and all reasonable inferences that can be drawn therefrom, no relief can be granted under any set of facts which could be proved. *See Ransom v. Marrazzo*, 848 F.2d 398, 401 (3d Cir. 1988). For this purpose, we cannot take cognizance of the affidavits of Hafer and West denying many of the plaintiffs' factual allegations.

B.

Individual Capacity Claim Against Hafer

In *Will v. Michigan Dept. of State Police*, 109 S.Ct. 2304, 2312 (1989), the Supreme Court held that neither a state nor state officials sued in their official capacities for money damages are "persons" under section 1983,[4] and that therefore a suit brought in state court against the Michigan Director of State Police was barred. The district court, relying on *Will*, concluded that the plaintiffs have sued Hafer only in her official capacity and therefore dismissed their

4. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

section 1983 claims. On appeal, the plaintiffs contend that the district court erred as a matter of law.

The lines marking the boundaries between official and personal capacity suits have been drawn primarily in the context of Eleventh Amendment cases. That amendment has been interpreted to bar suits for monetary damages by private parties in federal court against a state or against state agencies. *See Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974).[5] It also bars a suit against state officials in their official capacity, because the state is the real party in interest inasmuch as the plaintiff seeks recovery from the state treasury. *Graham*, 473 U.S. at 165-166. In a suit against state officials in their "personal" capacity, however, where the plaintiff seeks recovery from the personal assets of the individual, the state is not the real party in interest; the suit is therefore not barred by the Eleventh Amendment. *Id.* at 165-68.

The *Will* Court's conclusion that section 1983 suits could not be brought against state officials in their official capacity followed from the Court's earlier Eleventh Amendment decisions. Although the *Will* Court did not have occasion to consider the status of personal capacity suits against state officials under section 1983, we conclude, borrowing the same Eleventh Amendment jurisprudence that the *Will* Court looked to, that because personal capacity suits against state officials are actions against the individual and not the state, state officials sued for damages in their personal capacities are "persons" under section 1983 and therefore subject to suit. *See, e.g., Guiterrez-Rodruiguez v. Cartagena*, 882 F.2d 553, 567 n.10 (1st Cir. 1989).

5. In suits for injunctive or declaratory relief, however, the Eleventh Amendment does not bar an action in which a state official is the named party. Ex Parte Young, 209 U.S. 123 (1908).

In determining whether plaintiffs sued Hafer in her personal capacity, official capacity, or both, we first look to the complaints and the "course of proceedings." *Graham*, 473 U.S. at 167 in n.14 (quoting *Brandon v. Holt*, 469 U.S. 464, 469 (1985)); *see Gregory v. Chehi*, 843 F.2d 111, 119, (3d Cir. 1988). One of the Gurley complaints, which contains a request by six of the plaintiffs for both reinstatement and damages, explicitly specifies that plaintiffs' request for reinstatement "is asserted against the defendant in her official capacity," but that their monetary claims against Hafer "are asserted against the defendant in her personal capacity."

The *Will* opinion supports maintenance of a section 1983 claim against a state official for reinstatement. The Court, relying again on the Eleventh Amendment, stated that "a State official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.' " *Will*, 109 S.Ct. at 2311 n.10) quoting *Graham*, 473 U.S. at 167 n.14). It follows that the district court erred insofar as it dismissed the Gurley plaintiffs' claim for reinstatement against Hafer.[6]

As we noted above, these Gurley plaintiffs were explicit that their monetary claims were asserted against Hafer in her individual capacity. The remaining Gurley plaintiffs and the Melo plaintiffs, although not as explicit, signified a similar intent because the captions in the complaints only list "Barbara Hafer," and not the Commonwealth of Pennsylvania, as a defendant, and only request damages from Hafer and not from the state. It appears that Hafer understood that plaintiffs sought to sue her in her

6. There have been some references to arbitration proceedings initiated by plaintiffs which culminated in orders directing their reinstatement. Such awards are not relevant to the issues on appeal.

personal capacity because she raised the defense of qualified immunity throughout the course of these proceedings, a defense available only for governmental officials when they are sued in their personal, and not in their official, capacity. *See Graham*, 473 U.S. at 166-67; *Conner v. Reinhard*, 847 F.2d 384, 394 n. 8 (7th Cir.), *cert. denied*, 109 S.Ct. 147 (1988); *Melton v. City of Oklahoma City*, 879 F.2d 706, 727 n. 32 (10th Cir.), *reh'g granted in part on other grounds*, 888 F.2d 724 (10th Cir. 1989); *Lundgren v. McDaniel*, 814 F.2d 600, 604 (11th Cir. 1987).[7] Moreover, once plaintiffs explained in the district court that they sued Hafer for damages in her individual capacity, they should have been given leave to amend to so assert with specificity, if there was any remaining ambiguity about that issue.

The district court held that the plaintiffs only sued Hafer in her official capacity, notwithstanding their protestations to the contrary, because Hafer would not have been empowered to effectuate the removal of plaintiffs from their positions had she been acting in her personal capacity rather than in her role as Auditor General. However, the fact that Hafer's position as Auditor General cloaked her with the authority to fire the plaintiffs merely supports the undisputed proposition that she acted under color of state law in firing the plaintiffs, a prerequisite to a successful section 1983 suit. *See Robb v. City of Philadelphia*, 733 F.2d

7. A defendant being sued in his or her personal capacity should be given adequate notice that his or her personal assets are at stake. Two courts of appeals apparently require the complaint to specifically identify the capacity in which a defendant is being sued. *See* Wells v. Brown, 891 F.2d 591, 593 (6th Cir. 1989); Nix v. Norman, 879 F.2d 429, 431 (8th Cir. 1989). Our court has taken a more flexible approach, *see* Gregory v. Chehi, 843 F.2d at 119-20 (court "must interpret the pleading"); *see also Graham*, 473 U.S. at 167 n. 14. It is obviously preferable for the plaintiff to be specific in the first instance to avoid any ambiguity.

286, 290 (3d Cir. 1984).[8] It does not follow that every time a public official acts under color of state law, the suit must of necessity be one against the official in his or her official capacity. *See Graham,* 473 U.S. at 166 (to establish personal liability under section 1983 "*it is enough* to show that the official, acting under color of state law, caused the deprivation of a federal right") (emphasis added).

We reject Hafer's suggestion that a state official can be sued in her personal capacity only if the allegedly unconstitutional actions were not taken in her official capacity. The Supreme Court cases expressly recognize that individual capacity suits may be brought against government officials who acted under color of state law. *See, e.g., Brandon v. Holt,* 469 U.S. 464, 472-73 (1985); *Owen v. City of Independence,* 445 U.S. 622, 637-38 (1980). In fact, underlying each of the cases considering the availability of a qualified immunity defense to a claim for damages against the state official was an individual capacity claim. *See, e.g., Malley v. Briggs,* 475 U.S. 335 (1986) (suit by arrestee against state

8. The "under color of state law" requirement, which is identical to the "state action" requirement of the Fourteenth Amendment, requires a determination of "whether there is a sufficiently close nexus between the State and the challenged action." Johnson v. Orr, 780 F.2d 386, 390 (3d Cir.) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)), *cert. denied,* 479 U.S. 828 (1986). There is no question that Hafer, the head of the Department of Auditor General, *see,* 71 Pa. Cons. Stat. § 66 (Supp. 1990), is vested under state law with the authority to hire and fire employees in the Department, thereby satisfying the "under color of state law requirement." *See, e.g.,* 71 Pa. Cons. Stat. § 66 (Supp. 1990) (Department heads shall "exercise and perform the duties by law vested in and imposed upon the department"). The plaintiffs' allegation that Hafer misused her power in firing them does not deprive her actions of the imprimatur of state authority. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 929 (1982) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)) ("[M]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of state law.").

trooper); *Davis v. Scherer,* 468 U.S. 183 (1984) (suit by employee against official of state highway department); *Tower v. Glover,* 467 U.S. 914 (1984) (suit by clients against public defenders who allegedly conspired with state officials); *Procunier v. Navarette,* 434 U.S. 555 (1978) (suit by prisoner against state prison officials); *Imbler v. Pachtman,* 424 U.S. 409 (1976) (suit by former prisoner against state prosecuting attorney).

Hafer argues that because she has final policymaking authority over hiring and firing in the Auditor General's Department, her actions leading to the firing of the plaintiffs, even if in violation of a "just cause" dismissal policy followed by previous Auditor Generals, constitutes a new state policy and therefore precludes suit against her in her personal capacity. The Second Circuit, in a persuasive opinion, has rejected a similar argument.

In *Farid v. Smith,* 850 F.2d 917 (2d Cir. 1988), an inmate filed a civil rights action against the superintendent of the correctional facility for improperly depriving him of access to certain personal materials. The court held that although the Eleventh Amendment barred suit for damages against the superintendent in his official capacity, it did not bar the inmate from pursuing the action against the superintendent in his personal capacity, even if he was following state policy when committing such acts. *Id.* at 921. *A fortiori,* a state official who herself is responsible for an unconstitutional policy would be personally liable, unless of course she is ultimately successful in her qualified immunity claim. However, disposition on qualified immunity grounds is far different from a disposition on failure to state a claim, which is what the district court did here.

In short, we hold that a section 1983 claim for reinstatement may be maintained against Hafer in her official capacity, that a damage claim under section 1983 alleging civil rights violations may be maintained against Hafer in

her individual capacity, that the allegations in the complaints adequately put her on notice of that claim, and that such a claim is not barred by the Eleventh Amendment. Just as the district court erred in dismissing the reinstatement claims because Hafer is a "person" for injunctive relief, so also the district court erred in dismissing the plaintiffs' section 1983 damage claims against Hafer individually because she is a "person" in that capacity.[9]

C.

§ 1983 Conspiracy Claim Against West

The section 1983 claim against West asserted by the Melo plaintiffs stands on a different footing than the claim against Hafer. We must consider whether, under the allegations of the complaint, West, who was not a state official, can be viewed to have been acting under color of state law. Because the district court only considered the allegation that West and Hafer conspired to deprive the Melo plaintiffs of their constitutional rights as a claim under 42 U.S.C. § 1985(3),[10] it did not reach this issue. A fair reading of the complaint shows that plaintiffs seek to assert a section 1983 claim, and West does not contend otherwise.

Maintenance of a section 1983 claim requires a showing that the defendant acted under color of state law, but the Supreme Court has held that private parties acting in a conspiracy with a state official to deprive others of

9. Hafer contends on appeal that even if we were to hold that she is being sued in her personal capacity, we should nevertheless affirm the district court's dismissal of the action, as the plaintiffs' complaints fail to state claims under either the due process clause or the First Amendment. In light of the fact that the district court did not consider these issues in the first instance, we decline to reach them on appeal.

10. The court dismissed the claim under 42 U.S.C. § 1985(3) on the ground that plaintiffs failed to allege any racial or class-based animus, as required for such a claim. *See* Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). The Melo plaintiffs do not challenge this ruling on appeal.

constitutional rights are also acting "under color" of state law. *See Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970); *United States v. Price*, 383 U.S. 787, 794 (1966).[11] Consequently, such private parties can be subject to liability under section 1983. *See Adickes*, 398 U.S. at 152. It follows that federal employees who conspire with state officials to violate someone's constitutional rights are treated as acting under color of state law. *See Hampton v. Hanrahan*, 600 F.2d 600, 623 (7th Cir. 1979), *rev'd in part on other grounds*, 446 U.S. 754 (1980).[12]

The Melo complaint alleges that West transmitted the "jobs bought" list to Hafer when she was a candidate "with a knowledge, understanding and expectation that he would be creating a campaign issue favorable to Ms. Hafer and that Ms. Hafer, if elected, would fire all the people on the list." Melo App. at 13. Assuming *arguendo* that the alleged working relationship between Hafer and West during the fall 1988 campaign constitutes "concerted" or "joint" action sufficient to transmute West, a private actor, into one acting under color of state law, *see Robb v. City of Philadelphia*, 733 F.2d 286, 291-92 (3d Cir. 1984); *Cruz v. Donnelly*, 727 F.2d 79, 82 (3d Cir. 1984), it is insufficient in this case because Hafer was not a state actor at the time of the

11. For this purpose we assume, without deciding, that the complaint alleges the prerequisites of a civil conspiracy. *See* Hampton v. Hanrahan, 600 F.2d 600, 620-21 (7th Cir. 1979), *rev'd in part on other grounds*, 446 U.S. 754 (1980).

12. We therefore reject West's argument that private parties can be viewed as acting under color of state law only when state or municipal officials substituted the judgment of private parties for their own judgment. Although such a showing may be a basis for finding non-state officials to have been acting under color of state law, *see* Robb v. City of Philadelphia, 733 F.2d 286, 292 (3d Cir. 1984), it is not the only one. See note 13 *infra*.

alleged concerted and conspiratorial conduct.[13] We note that the complaint does not allege that Hafer and West conspired at any time after Hafer took office.

It is true that conspirators can be held liable for subsequent acts taken pursuant to a conspiracy, *see Hampton*, 600 F.2d at 621, and that the Melo plaintiffs have alleged that their firing after Hafer became a state official was "in the course of, in furtherance of and was the culmination of the aforesaid conspiracy." Melo App. at 18. However adequate these allegations might be, if proven, to impose liability under civil conspiracy law generally for acts subsequent to the formation of the conspiracy, they do not supply the missing link of action under color of state law.

When a private party has been held to be acting under color of state law, it has always been because of action in conjunction with an official who was then a state actor. *See, e.g., Adickes*, 398 U.S. at 149-52; *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941-42 (1982); *United Steelworkers of America v. Phelps Dodge*, 865 F.2d 1539, 1546-47 (9th Cir.) (en banc), *cert. denied*, 110 S.Ct. 51 (1989); *Robb*, 733 F.2d at 291-92. It is the presence of that state actor that clothes the private party with the "under color of state law" vestment. *See Adickes*, 398 U.S. at 152 (" 'Private persons, jointly engaged *with state officials* in the prohibited action, are acting "under color" of law for purposes of the statute.' ") (quoting *Price*, 383 U.S. at 794 (1966)) (emphasis added); *Lugar*, 457 U.S. at 941 ("private party's joint participation *with state officials* in the seizure of disputed property is sufficient to characterize that party as a 'state actor'

13. We focus on the alleged conspiracy because the Melo complaint provides no allegations which could satisfy the other bases for holding a private actor to possible liability under section 1983 discussed in National Collegiate Athletic Assoc. v. Tarkanian, 109 S.Ct. 454, 462 (1988) (state creation of legal framework governing defendant's conduct, delegation of authority to defendant, and knowing acceptance of benefits derived from the defendant's conduct).

for purposes of the Fourteenth Amendment") (emphasis added). When neither of the parties who allegedly conspired is a state official, there is no state actor to supply even a colorable basis for investing the private actor with a state mantle, even if one of the parties later becomes a state official. Plaintiffs have cited no case for such a proposition, and we see no reason to stretch the law so far. It follows that the Melo complaint failed to state a section 1983 claim against West, and the court did not err in dismissing that claim.

D.

State Law Claims

We turn finally to the dismissal of the state law claims. While the Melo action against West containing both federal and state law claims was pending in the district court, the government filed a scope of employment certification and motion to substitute itself for West. In doing so, the government followed the procedure established by the Federal Employees Liability Reform and Tort Compensation Act of 1988 (FELRTCA), which amended the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2670-2680 (1988).

FELRTCA was passed in response to *Westfall v. Erwin*, 484 U.S. 292 (1988), which held that a federal employee is immune only if s/he was acting within his/her scope of employment *and* was exercising governmental discretion. The primary purpose of FELRTCA was "to return Federal employees to the status they held prior to the *Westfall* decision," that is, a status of absolute immunity for activities within their scope of employment. *See* H.R. Rep. No. 100-700, 100th Cong., 2d sess., *reprinted in* 1988 U.S. Code Cong. & Admin. News 5945, 5947 [hereinafter H.R. Rep. No. 100-700]. To accomplish that mission, FELRTCA established an exclusively remedy against the United States for suits based on certain negligent or wrongful acts of federal employees acting within the scope of their employment,

28 U.S.C. § 2679(b)(1) (1988), and also added a statutory procedure for certification by the Attorney General to effect a substitution of the United States for its employees in cases pending in federal courts.

The relevant provision states that:

> [u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. § 2679(d)(1) (1988).

The district court granted the United States' motion for substitution, explaining that because the government certified that West had acted within the scope of his employment,[14] the substitution of the government for West was "necessitated." The court then granted the United States' motion to dismiss the state law claims of defamation and contractual interference because the FTCA's waiver of tort immunity for damages "caused by the negligent or wrongful act or omission of any employee" of the federal government "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred," 28 U.S.C. § 1346(b) (1988), does not apply to "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 2680(h) (1988).

14. The United States Attorney General has delegated this certification authority to United States Attorneys in consultation with the Department of Justice. *See* 28 U.S.C. § 510 (1988); 28 C.F.R. § 15.3(a) (1989).

Although the district court stated that plaintiffs do not contest that West was acting within the scope of his employment when he allegedly performed the acts complained of, plaintiffs do in fact contest the accuracy of the scope of employment certification. We must thus consider whether the government's certification under 28 U.S.C. § 2679(d)(1)[15] is binding for purposes of substitution of the government, as the government argued in the district court and the district court held, or whether such a certification is subject to judicial review. The courts have divided on this issue. *Compare Nasuti v. Scannell*, Nos. 89-1830, 89-1831, 89-2001, slip op. at 31 (1st Cir. June 29, 1990) (judicial review of scope certification permitted); *Arbour v. Jenkins*, 903 F.2d 416, 421 (6th Cir. 1990) (same); *Gogek v. Brown University*, 729 F. Supp. 926, 933 (D.R.I. 1990) (same); *Baggio v. Lombardi*, 726 F. Supp. 922, 925 (E.D.N.Y. 1989); *Martin v. Merriday*, 706 F. Supp. 42, 44-45 (N.D.Ga. 1989) (same); *with S.J.and W. Ranch, Inc. v. Lehtinen*, 717 F. Supp. 824, 826-27 (S.D. Fla. 1989) (no judicial review of scope certification); *Mitchell v. United States*, 709 F. Supp. 767, 768 & n.4 (W.D. Tex. 1989) (same), *rev'd on other ground*, 896 F.2d 128 (5th Cir. 1990);[16] *see also Mitchell v.*

15. The plaintiffs do not suggest that this section does not apply to a state law claim pendent to a federal claim filed initially in federal court. The plain statutory language covers this situation. We note that the government's certification of scope of employment was filed pursuant to 28 U.S.C. § 2679(d)(1), for purposes of substituting the United States for West in the federal action, and not pursuant to 28 U.S.C. § 2679(d)(2), to remove the state court action. West, however, had removed the action pursuant to other provisions of the United States Code.

16. Two other courts of appeals, although not directly addressing this issue, have suggested that plaintiffs may seek judicial review of certification. *See* Sowell v. American Cyanamid Co., 888 F.2d 802, 805 (11th Cir. 1989) ("[T]he Department of Justice has determined that [defendant] was acting within the scope of his employment, a determination which is obviously correct in light of the testimony at trial."); Lunsford v. Price, 885 F.2d 236, 238 n.7 (5th Cir. 1989) (noting that

Carlson, 896 F.2d 128, 134, 136 (5th Cir. 1990) (suggesting no judicial review of scope certification); *Aviles v. Lutz*, 887 F.2d 1046, 1049 (10th Cir. 1989) (same).

While this case was on appeal, the United States changed its position on this issue. The government now states that although the government's determination is entitled to deference, "the district court may review the Attorney General's certification that the challenged acts occurred within the scope of employment of a federal official."[17] In light of the division among the courts on this issue, we will analyze the issue *de novo* before establishing this court's position.

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plaintiffs did not contest certification that employees' acts were within scope of employment).

17. The relevant portion of the government's letter states:

> At oral argument, the Court . . . asked the undersigned counsel whether Mr. West contended that a determination by a government agency that an employee committed an alleged tort while acting within the scope of his employment was binding and conclusive on that issue and required that the Government be substituted as defendant. Although the Government initially advanced this interpretation of the statute following enactment, upon further inquiry counsel for Mr. West has learned that the Government's current position based on the legislative history of this statute is that the Attorney General's scope of employment determination is binding only for the purpose of the removal of a suit against a federal employee to federal court under 28 U.S.C. § 2679(d)(2). With respect to whether the United States must be substituted as defendant as to tort claims raised against a federal employee, the Government's position is that, although the government's determination is entitled to deference, the district court may review the Attorney General's certification that the challenged acts occurred within the scope of employment of a federal official.

Letter from Barbara L. Herwig and Peter R. Maier, Attorneys, Appellate Staff, Civil Division (March 20, 1990).

We must first look to the language of the statute, *see United States v. James*, 478 U.S. 597, 606 (1986), and in particular to the distinction in the language between sections 2679(d)(1), governing certifications in cases filed initially in federal court, and section 2679(d)(2), authorizing the Attorney General to provide certifications for the purpose of removing actions filed in state court to federal court.[18] The last sentence of section 2679(d)(2) specifically provides that "[t]his certification of the Attorney General shall conclusively establish scope of office or employment *for purposes of removal*." 28 U.S.C. § 2679(d)(2) (emphasis added). There is no similar language of conclusiveness in section 2679(d)(1). Also, the explicit statement that the binding character of certification applies only "for purposes of removal" suggests that Congress recognized a distinction between use of the certification for removal and its use for purposes of substitution of the government as the defendant in actions filed in federal court. *See Nasuti, Nos.* 89-1830, 89-1831, 89-1001, slip op. at 28-29.

There are significant policy reasons why Congress would choose to give the government an unchallengeable right to have a federal forum for tort suits brought against

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18. Section 2679(d)(2) provides in full that:

> [u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

its employees. Historically, the government has generally preferred to have litigation which it or its employees are defending in the neutral confines of federal courts. For example, a similarly "absolute" right of removal is provided by 28 U.S.C. § 1442(a)(1) whenever a suit against a United States officer is filed in a state court for any act "under color of [federal] office" because, as the Supreme Court has explained, "Congress has decided that federal officers, and indeed the Federal Government itself, require the protection of a federal forum." *Willingham v. Morgan*, 395 U.S. 402, 407 (1969).

There is no suggestion in FELRTCA that once the federal forum has been secured, Congress was inclined to make the Attorney General's right to substitute the government for the employee unreviewable. In fact, Congress acknowledged the propriety of having a federal court review the scope of employment issue when the positions of the federal employee and the government conflict. Under 28 U.S.C. § 2679(d)(3) (1988), "[i]n the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment." The same provision insures a federal forum for such a judicial determination.[19] There is no reason why Congress would have provided employees with judicial review of the scope of employment certification decisions while denying a similar review of certification decisions to dissatisfied plaintiffs.

19. If the employee petition is filed in an action pending in state court, the action may be removed without bond by the Attorney General to the federal court for such a determination, to be remanded if the court determines that the employee was not acting within the scope of employment. 28 U.S.C. § 2679(d)(3).

The legislative history of the Act also supports our reading of FELRTCA. In discussing the exclusivity issue, the House Report noted that the Federal Drivers Act, 28 U.S.C. § 2679(b)-(e) (1982) (subsequently amended in 1988), one of the components of FTCA, provided an exclusive federal remedy when the injuries resulted from the operation of a motor vehicle by a federal employee acting within the scope of his employment. See H.R. 100-700, 1988 U.S. Code Cong. & Admin. News at 5948. The Drivers Act contained a provision for a scope of employment certification by the Attorney General for purposes of removal to federal court. Although it did not set forth any scope-of-employment certification procedures for actions filed in federal court, federal courts routinely made a determination as to whether the employee was acting within his or her scope of employment before ruling whether the action could be maintained against the government exclusively. *See, e.g., Cronin v. Hertz Corp.*, 818 F.2d 1064 (2d Cir. 1987); *Borrego v. United States*, 790 F.2d 5 (1st Cir. 1986); *Levin v. Taylor*, 464 F.2d 770 (D.C. Cir. 1972).

The extensive discussion in the House Report on the factors relevant to whether an act was within the employee's scope of employment, *see* H.R. Rep. No. 100-700, 1988 U.S. Code Cong. & Admin. News at 5949-50, suggests that Congress intended that the practice of court determination of the issue should be continued. Representative Frank, the sponsor of the Act, confirmed that FELRTCA was meant to ensure continuity, rather than a break, with past practice when he stated at a legislative hearing that "the plaintiff would still have the right to contest the certification if they [sic] thought the Attorney General were certifying without justification." *Legislation to Amend the Federal Tort Claims Act: Hearing Before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary*, 100th Cong., 2d Sess. 60, 128 (April 14, 1988) (statement of Representative Frank).

Based on the language, structure, and legislative history of FELRTCA, we thus independently conclude that the district court may review the government's certification that the actions which the Melo plaintiffs allege that West took were within the scope of his employment.

It is therefore evident that we must vacate the district court's dismissal of the state law claims. The dismissals were predicated on the government's status as a defendant, which in turn is dependent on whether West was acting in the scope of employment. On remand, the parties will have an opportunity to address that issue. *See* 28 U.S.C. § 1346(b) (scope of employment determination under the FTCA to be made "in accordance with the law of the place where the act or omission occurred"); *see also Williams v. United States*, 350 U.S. 857 (1955) (per curiam). The district court will also have to decide which factors are relevant to that determination. The briefs of the parties have not discussed that issue.[20]

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20. In light of our holding, we need not reach the question of whether the government, if properly substituted for West, would be able to dismiss the action because of the exception to its waiver of sovereign immunity for claims of defamation and interference with contractual relations under 28 U.S.C. § 2680(h). *Compare Mitchell*, 896 F.2d at 134-36 (plaintiff without remedies if government, as substituted party, is immune); *Aviles*, 887 F.2d at 1049-50 (same); *Sowell*, 888 F.2d at 805-06 (same); Moreno v. Small Business Admin., 877 F.2d 715 (8th Cir. 1989) (same) *with* Smith v. Marshall, 885 F.2d 650, 654-56 (9th Cir. 1989) (plaintiff may proceed against individual employee if substitution of government would lead to dismissal because of government immunity under 28 U.S.C. § 2680(k)), *cert. granted sub nom.* United States v. Smith, 110 S.Ct. 2617 (1990); Newman v. Soballe, 871 F.2d 969, 971-73 (11th Cir. 1989) (same).

It is unclear whether a federal employee who was not acting within the scope of his employment may yet have acted under color of his office insofar as that determination will control whether he is entitled to a federal forum, *see* 28 U.S.C. § 1442(a)(1), and we will not attempt to answer that entirely hypothetical question (in advance of the district court's ruling on the government's scope of employment certification), the parties not having even briefed this issue. The point is relevant to the motion for remand, on which the district court must rule if it determines that West was not acting within the scope of his employment. Moreover, in view of the many uncertainties and imponderables about the status of the case on remand, we leave to the district court in the first instance the question whether, if the district court determines that West was not acting in the scope of his employment, the state law claims included in the federal action should be dismissed, *see* Tully v. Mott Supermarkets, Inc., 540 F.2d 187 (3d Cir. 1976), because they were pendent to a federal claim against him which has been dismissed.

V.

Conclusion

For the foregoing reasons, we will vacate the orders of the district court dismissing the civil rights claims as to Hafer and dismissing the Melo plaintiffs' state law claims as to West, and remand for further proceedings consistent with this opinion. We will affirm the order dismissing the Melo plaintiffs' section 1983 claim against West.

Costs to be awarded to appellants in the Gurley action. In the Melo action, appellants to bear one-third of the costs, Hafer one-third, and West one-third.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

United States District Court
For The Eastern District of Pennsylvania

JAMES C. MELO, JR.	:	CIVIL ACTION
	:	
vs.	:	
	:	
BARBARA HAFER	:	
–and–	:	
JAMES J. WEST, ESQUIRE	:	
		NO. 89-2935

AMENDED COMPLAINT

The Parties

1. Plaintiff is an individual who resides at 1054 Neshaminy Valley Drive, Bensalem, PA 19020. Plaintiff resides within the Eastern District of Pennsylvania.

2. Defendant Barbara Hafer ("Ms. Hafer") is the current Auditor General of the Commonwealth of Pennsylvania and maintains a regular place of business in the Office of the Auditor General, Harrisburg, PA 17120. Plaintiff does not know Ms. Hafer's resident address. Ms. Hafer also maintains regular places of business for the Office of the Auditor General throughout Pennsylvania including the Eastern District of Pennsylvania.

3. Defendant James J. West, Esquire ("Mr. West") is the United States Attorney for the Middle District of Pennsylvania and maintains a regular place of business at the Federal Building, 228 Walnut Street, Harrisburg, PA 17108. Plaintiff does not know Mr. West's resident address. The office of the United States Attorney maintains regular places of business in the Commonwealth of Pennsylvania including the Eastern District of Pennsylvania.

Jurisdiction and Venue

4. This is an action to redress the deprivation, under color of Pennsylvania Law, of rights and privileges secured to plaintiff by the Constitution of the United States together with pendant State Court claims. Jurisdiction arises under 42 U.S.C. 1983, 1985 and 1988 and 28 U.S.C. 1343 and pendent jurisdiction.

5. Venue is proper in the Eastern District of Pennsylvania because plaintiff resides in the Eastern District of Pennsylvania and because Mr. West is an officer or employee of the United States who was acting under color of legal authority at all times relevant hereto. Venue is also proper because Ms. Hafer maintains a regular place of business in the Eastern District as does the Office of the United States Attorney.

Statement of Operative Facts

6. From 1977 through January, 1989, plaintiff was continuously employed by the Commonwealth of Pennsylvania in the Office of the Auditor General as a Field Auditor. During said period of time, plaintiff received promotions and his work was at least satisfactory.

7. The position plaintiff held with the Office of the Auditor General was not that of an advisor or a formulator of plans for the implementation of broad goals. Plaintiff did not serve in a policy-making or confidential position. Party affiliation was not a necessary or appropriate requirement for the effective performance of plaintiff's duties.

8. Plaintiff had no involvement in any job buying and/or job promotion scheme in the Auditor General's Office. Plaintiff did not provide money or anything of value to any person in connection with his employment, continued employment or the promotions he received during the

course of his employment. Further, plaintiff has no knowledge that any third-person provided money or anything of value on plaintiff's behalf in connection with plaintiff's employment.

9. At some time prior to January 21, 1988, the date being unknown to plaintiff, John Kerr, a former employee of the Office of the Auditor General of Pennsylvania, and a convicted felon, stated that in 1978 he received a payment from a person other than plaintiff to influence a promotion for plaintiff. Mr. Kerr also identified approximately twenty (20) other employees of the Office of the Auditor General of Pennsylvania on whose behalf payments were made to him to influence either employment or promotions.

10. On or about January 21, 1988, Mr. West provided to Donald Bailey ("Mr. Bailey"), the then Auditor General of Pennsylvania, in a "Personal and Confidential" communication, the list of said 21 employees. A copy of said communication is attached hereto and marked Exhibit "1". Mr. West stated in Exhibit "1":

> ". . . We can express no opinion on whether these listed individuals knew of the purchase of their jobs other than the fact that our investigation affirmatively indicates that
>
> ---
>
> did not know about her job purchase . . . I would request that you keep these names strictly confidential, not use them for any type of media disclosures other than necessary to appropriate administrative proceedings, and make them available only to your most trusted employees on a need-to-know basis."

11. Mr. Bailey then conducted an investigation of the said 21 employees, including plaintiff. The conclusion of the investigation was that, with regard to plaintiff, there was no evidence that he committed wrongdoing or was aware of wrongdoing committed on his behalf. Attached hereto and marked Exhibit "2" is a copy of memo of October

17, 1988 from James L. McAneny, Chief Counsel for the Auditor General, to Mr. Bailey.

12. With specific reference to plaintiff, the investigation conducted by the Office of the Auditor General failed to disclose any corroboration of the statements made by Mr. Kerr.

13. In or about April 30, 1988, Ms. Hafer was nominated by the Republican Party of Pennsylvania to be the Republican candidate for the position of Auditor General of Pennsylvania, which position was up for election in November of 1988. At approximately the same time, Mr. Bailey was nominated by the Democratic Party of Pennsylvania to be the Democratic candidate for the position of Auditor General of Pennsylvania.

14. In 1988 and 1989, Mr. West has been a registered Republican.

15. In 1988 and 1989, plaintiff has been a registered Democrat.

16. The election campaign between Ms. Hafer and Mr. Bailey for the Office of Auditor General of Pennsylvania began approximately April 30, 1988 and continued until the November, 1988 election.

17. During said election campaign, Mr. West, under color of legal authority, provided Ms. Hafer with a copy of Exhibit "1" (wherein plaintiff's name appears on the list of twenty-one (21) employees) and advised Ms. Hafer that the persons whose names appeared on the list "bought their jobs."

18. In providing the aforesaid information to Ms. Hafer and in making the statement(s) to Ms. Hafer that the persons whose names appeared on the list "bought their jobs", Mr. West was motivated by a desire to assist the Republican candidate for Auditor General in the Novem-

ber, 1988 election and to create and/or foster a campaign issue that favored Ms. Hafer.

19. In the course of her campaign, Ms. Hafer stated on numerous occasions that she had received from Mr. West a list of employees of the Office of the Auditor General of Pennsylvania who had "bought their jobs" and Ms. Hafer further stated that, if elected, she would fire all of the employees whose names appeared on the list provided by Mr. West. The issue of "list of employees bought their jobs" was a major issue in the campaign.

20. When Mr. West provided Ms. Hafer with information about the list and advised Ms. Hafer that the persons on the list had "bought their jobs," he did so with a knowledge, understanding and expectation that he would be creating a campaign issue favorable to Ms. Hafer and that Ms. Hafer, if elected, would fire all of the people on the list.

21. Ms. Hafer won the November, 1988 election and was officially inaugurated on or about January 16, 1989.

22. On February 1, 1989, Ms. Hafer fired plaintiff. Ms. Hafer issued to plaintiff and made part of plaintiff's file a firing letter dated February 1, 1989, a copy of which is attached hereto and marked Exhibit "3".

23. The reason Ms. Hafer gave for firing plaintiff was that plaintiff's firing was "necessary based on information gathered by my office as well as through cooperation with other governmental agencies as a result of an investigation of your involvement in a job buying and/or a job promotion scheme in the Auditor General's Office."

24. Plaintiff avers, upon information and belief, that on or about February 1, 1989, Ms. Hafer also fired seventeen (17) other employees whose names appeared on the list and who were then employed at the Office of the Auditor General.

25. The only people Ms. Hafer fired on February 1, 1989 were persons whose names appeared on the list provided to Ms. Hafer by Mr. West. Ms. Hafer made public statements on February 1, 1989 that she was in fact firing eighteen (18) employees of the Office of the Auditor General of Pennsylvania who had paid "up to $5,000 each for their jobs under a previous administration." Mr. West stated on February 1, 1989 that he appreciated Ms. Hafer's definitive action in firing the eighteen (18) employees. Attached hereto and marked Exhibit "4" is a copy of an article from the February 2, 1989 edition of the Patriot-Capital News which accurately sets forth the statements made by Ms. Hafer and Mr. West on February 1, 1989 concerning the firings.

26. Subsequent to her election, neither Ms. Hafer nor anyone on her behalf or at her direction conducted any examination or investigation with regard to plaintiff's alleged involvement in a "job buying and/or job promotion scheme" in the Auditor General's Office.

27. When Ms. Hafer fired plaintiff or February 1, 1989, she did not have in her possession any more information than was in the possession of the Auditor General's office on October 17, 1988, the date of Exhibit "2."

28. The firing of plaintiff by Ms. Hafer was the culmination of joint, concerted, and conspiratorial conduct between Ms. Hafer and Mr. West to create a campaign issue which would help Ms. Hafer win the election and was the fulfillment of a campaign promise made by Ms. Hafer which was an integral part of the campaign issue and the conspiracy created by Ms. Hafer and Mr. West. Without Mr. West's participation, the issue would not have been created and plaintiff would not have been fired.

29. The personnel disciplinary powers of the department of the Auditor General are governed by the same due

process standards that control decisions by any prosecutorial or civil authority.

30. Beginning in or about January, 1986, and continuing to the present, the department of the Auditor General has maintained in full force and effect a Policy and Procedure Manual. Copies of Sections 200 and 300 of said manual are attached hereto and marked Exhibits "4" and "5" respectively. Exhibits "4" and "5" apply to position actions and separations for employees of the Office of the Auditor General, including plaintiff, and specified the circumstances under which an employee may be disciplined, demoted, suspended or dismissed.

31. Ms. Hafer did not follow, comply or conform to the Policy and Procedural Manual with regard to firing plaintiff.

FIRST COUNT

Plaintiff's vs. Defendants for Deprivation of Civil Rights

32. Plaintiff re-alleges all preceding paragraphs.

33. Defendants, in connection with the firing of plaintiff on February 1, 1989, jointly and/or severally and under color of State law, subjected plaintiff and caused plaintiff to be subjected to a deprivation of the rights, privileges and immunities secured to him by the Constitution and laws of the United States.

34. In connection with firing plaintiff, Ms. Hafer did not follow, comply or conform to the Policy and Procedural Manual of the Office of Auditor General with regard to position actions and separations as well as disciplinary actions and dismissal. Plaintiff was fired without cause, without a hearing, without a reasonable pre-firing investigation and without procedural or substantive due process. Plaintiff was denied property and property rights without due process of law.

35. Plaintiff's firing was because of plaintiff's political affiliation and as a result of a purely political process. Defendants, jointly and/or severally, made plaintiff and his job a campaign issue and, because the Republican candidate won the election, plaintiff was fired. Defendants have deprived plaintiff of his right of free speech and political association.

36. When Ms. Hafer fired plaintiff, Ms. Hafer made charges against him which could seriously damage his standing and his association in his community and imposed upon plaintiff a stigma and disability that has and will foreclose plaintiff's freedom to take advantage of other employment opportunities. Defendants, during the election, and in connection with plaintiff's firing, have created and disseminated a false and defamatory impression about plaintiff. Defendants have deprived plaintiff of liberty without due process of law.

37. Ms. Hafer and Mr. West engaged in concerted and conspiratorial conduct in creating a campaign issue during the fall 1988 campaign for the Auditor General's Office wherein allegations were made by Ms. Hafer that Mr. West had provided her with a list of 21 employees who bought their jobs. In engaging in said conspiracy, Mr. West and Ms. Hafer were motivated, in whole or in part, to enable Ms. Hafer to win the election. All statements made by Ms. Hafer during the course of the campaign that persons on the list bought their jobs and all statements made by Ms. Hafer after her election in connection with the firing of said persons, including plaintiff, were made in the course of and in furtherance of the aforesaid conspiracy. The firing of plaintiff was in the course of, in furtherance of and was the culmination of the aforesaid conspiracy.

38. As a result of the deprivations of plaintiff's civil rights, as heretofore alleged, plaintiff suffered loss of employment, loss of income, loss of earning capacity, loss

of earning potential, damage to his reputation, standing and associations in his community, disability with regard to future employment and other employment opportunities, emotional upset, aggravation, indignation, anxiety and outrage. Because of emotional upset caused by his firing, plaintiff suffered an aggravation of pre-existing Crone's Disease which has caused him additional physical pain and suffering and has further caused him to incur medical expense all of which may continue into the indefinite future.

WHEREFORE, plaintiff claims compensatory damages in an amount of $500,000.00.

SECOND COUNT

Plaintiff vs. Ms. Hafer and Mr. West for Conspiracy to Interfere with Civil Rights

39. Under the Penal Laws of the United States and the Commonwealth of Pennsylvania, plaintiff was not guilty of any crime in connection with his employment, continued employment or promotions with the Office of the Auditor General of Pennsylvania. Further, in accordance with the Policy Procedural Manual of the Office of the Auditor General of Pennsylvania, he was not properly the subject of discipline, demotion, suspension or dismissal. Further, by the fall of 1988, all applicable statutes

GROEN, LAVESON, GOLDBERG, RUBENSTONE & FLAGER

By: William Goldstein, Esquire
Attorney I.D. No. 12532
One Greenwood Square
Suite 101
Bensalem, PA 19020
(215) 638-9330

Counsel for plaintiff

JURY TRIAL DEMANDED

By: _____
WILLIAM GOLDSTEIN

IN THE

United States District Court
For The Eastern District of Pennsylvania

CARL GURLEY		: CIVIL ACTION
	Plaintiff	:
		:
vs.		:
		:
BARBARA HAFER		:
	Defendant	: NO. 892685

COMPLAINT

1. Plaintiff is an individual who resides at 1430 North Felton Street, Philadelphia, PA 19131. Plaintiff resides within the Eastern District of Pennsylvania.

2. Defendant is the duly elected Auditor General of the Commonwealth of Pennsylvania and maintains a regular place of business in the Office of the Auditor General, Harrisburg, PA, 17120. Plaintiff does not know Defendant's resident address.

3. From January, 1979 through February 21, 1989, Plaintiff was continuously employed by the Commonwealth of Pennsylvania in the Office of the Auditor General as an Investigator. During said period of time, Plaintiff received promotions and his work was uniformly rated as satisfactory or better than satisfactory.

4. From January, 1980 to February 21, 1989, Plaintiff was Special Agent in charge of the Philadelphia Office of the Auditor General's Bureau of Investigations with his office at 1400 Spring Garden Street, Philadelphia, PA, which is within the Eastern District of Pennsylvania.

5. The position Plaintiff held with the Office of the Auditor General was not that of an advisor or formulator of plans for the implementation of broad goals. Plaintiff did not serve in a policy-making or confidential position. Party affiliation was not a necessary or appropriate requirement for the effective performance of Plaintiff's duties.

6. Plaintiff is a registered Democrat and has been so registered since 1955.

7. Defendant was elected to the position of Auditor General in the November, 1988 election and assumed the duties of her office January, 1989.

8. Defendant is a registered Republican and was elected to the position of Auditor General as the Republican candidate for that position.

9. The Auditor General before Defendant was Donald Bailey ("Mr. Bailey").

10. Mr. Bailey was Defendant's opponent in the November, 1988 election and was the Democrat candidate for that office. Mr. Bailey lost the election to Defendant.

11. The personnel disciplinary powers of the Department of the Auditor General are governed by the same due

process standards that control decisions by any prosecutorial or civil authority.

12. In or about January, 1986, the Department of Auditor General promulgated Policy Procedure Manual which has continued to be in full force and effect from January, 1986 to the present. Sections 200 and 300 of said Manual apply to Position Actions and Separations and specify the circumstances under which an employee of the Office of the Auditor General may be disciplined, demoted, suspended or dismissed. Copies of Section 200 and 300 are attached hereto and marked Exhibit "1" and "2" respectively.

13. On February 21, 1989, Defendant discharged Plaintiff from employment. Defendant issued to Plaintiff and made part of Plaintiff's file a certain discharge letter dated February 21, 1989, a copy of which is attached hereto and marked Exhibit "3".

14. The Defendant has provided Plaintiff with no reason for his discharge.

FIRST COUNT

Deprivation of Due Process

15. Plaintiff re-alleges all preceding paragraphs.

16. When Defendant fired Plaintiff on or about February 21, 1989, Defendant, under color of law of the Commonwealth of Pennsylvania, subjected Plaintiff, a citizen of the United States to a deprivation of the rights, privileges and immunities secured by the Constitution and laws of the United States.

17. Defendant did not follow, comply or conform to the Policy and Procedure Manual of the Department of the Auditor General with regard to position actions and separations as well as disciplinary actions and dismissal.

18. Defendant denied Plaintiff property and property rights without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and as guaranteed by the Federal Civil Rights Act, 42 U.S. Code, Section 1983.

19. As a result of the deprivations of Plaintiff's civil rights, as heretofore alleged, Plaintiff suffered loss of employment, loss of income, loss of earning capacity, loss of earning potential, damage to his reputation, standing and associations in his community, disability with regard to future employment and other employment opportunities, emotional upset, aggravation, indignation, anxiety and outrage.

WHEREFORE, Plaintiff claims compensatory damages against Defendant for monetary losses and physical and emotional pain and suffering of $500,000.00.

SECOND COUNT

Deprivation of Freedom of Speech

20. Plaintiff re-alleges all preceding paragraphs.

21. Defendant fired Plaintiff because of Plaintiff's political affiliation to wit, the Plaintiff was a Democrat. In so doing Defendant caused Plaintiff to be deprived of his right to free speech in violation of the First Amendment to the Constitution of the United States and as guaranteed by the Federal Civil Rights Act, 42 U.S. Code, Section 1983.

22. As a result of the deprivations of Plaintiff's civil rights, as heretofore alleged, Plaintiff suffered loss of employment, loss of income, loss of earning capacity, loss of earning potential, damage to his reputation, standing and associations in his community, disability with regard to future employment and other employment opportunities, emotional upset, aggravation, indignation, anxiety and outrage.

WHEREFORE, Plaintiff claims compensatory damages against Defendant for monetary losses and physical and emotional pain and suffering of $500,000.00.

THIRD COUNT

Punitive Damages

23. Plaintiff re-alleges all preceding paragraphs.

24. When Defendant fired Plaintiff, Defendant was motivated by an evil motive and evil intent and acted with reckless and callous indifference to Plaintiff's federally protected rights. Defendant acted in bad faith, without reasonable cause, and in wanton disregard for Plaintiff's Constitutional rights. Defendant maliciously made charges stigmatizing Plaintiff's reputation.

WHEREFORE, Plaintiff claims punitive damages of Defendant in the amount of $500,000.00.

FOURTH COUNT

Counsel Fees

25. Plaintiff re-alleges all preceding paragraphs.

26. Pursuant to the Federal Civil Rights Act, 42 U.S. Code, Section 1988, Plaintiff requests that the Court award and direct Defendant to pay Plaintiff's reasonable attorney's fees.

WHEREFORE, Plaintiff claims of Defendant reasonable attorney fees in an amount not yet determined.

Groen, Laveson, Goldberg,
Rubenstone & Flager

By: _____
WILLIAM GOLDSTEIN, ESQUIRE

Dated: _____

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*MEMBER OF PA & NJ BARS
▲MEMBER OF PA, NJ & DC BARS

April 25, 1989

The Honorable Barbara Hafer
OFFICE OF THE AUDITOR GENERAL
Finance Building
Room 229
Harrisburg, PA 17120

RE: James C. Melo, Jr. vs.
Barbara Hafer and James J. West, Esquire
C.A. No. 89-2935

Dear Madam Hafer:

We represent James C. Melo, Jr. in the captioned matter.

I enclose copy of Complaint which has been filed in the United States District Court for the Eastern District of Pennsylvania. I also enclose copy of Summons which notifies you of your obligation to file an Answer to the Complaint within twenty (20) days of service of the Summons. I also enclose Civil Forms 635 and 652. Form 635 advises you of your right to consent to disposition of the case by a United States magistrate and Form 652 is an Acknowledgement of Receipt of Summons and Complaint. The bottom half of Form 652 is to be completed by you and returned to me in the envelope enclosed for that purpose.

Very truly yours,

WILLIAM GOLDSTEIN

WG:es
Enclosures
CERTIFIED MAIL/RETURN RECEIPT REQUESTED

SUMMONS IN A CIVIL ACTION

UNITED STATES DISTRICT COURT — **District** EASTERN DISTRICT OF PENNSYLVANIA

JAMES C. MELO, JR. : Docket No. C.A. 89-2935

v.

BARBARA HAFER and JAMES J. WEST, ESQUIRE : To: (Name and Address of Defendant)

Barbara Hafer
Office of the Auditor General
Finance Building, Room 229
Harrisburg, PA 17120

YOU ARE HEREBY SUMMONED and required to serve upon

Plaintiff's Attorney (Name and Address)

William Goldstein, Esq.
GROEN, LAVESON, GOLDBERG, RUBENSTONE & FLAGER
One Greenwood Square
Suite 101
Bensalem, PA 19020

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so,

judgment by default will be taken against you for the relief demanded in the complaint.

Clerk MICHAEL E. KUNZ Date 4/21/89

(By) Joan Blumenthal
Deputy Clerk

IN THE

United States District Court For the Eastern District of Pennsylvania

JAMES C. MELO, JR.	:	Civil Action No. 89-2935
	:	
vs.	:	
	:	NOTICE OF ACKNOWL-
BARBARA HAFER	:	EDGEMENT OF RECEIPT
and	:	OF SUMMONS AND
JAMES J. WEST, ESQUIRE	:	COMPLAINT

NOTICE

TO: The Honorable Barbara Hafer
(Name)

Office of the Auditor General
Finance Building, Room 229
(Street)

Harrisburg, PA 17120
(City and State)

The enclosed summons and complaint are served pursuant to Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure.

You must complete the acknowledgement part of this form and return one copy of the completed form to the sender within 20 days.

You must sign and date the acknowledgement. If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and

you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within 20 days, you (or the party on whose behalf you are being served) may be required to pay any expense incurred in serving a summons and complaint in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the complaint within 20 days. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

I declare, under penalty of perjury, that this Notice of Acknowledgement of Receipt of Summons and Complaint was mailed on April 25, 1989.

April 25, 1989
(Date of Signature)

ACKNOWLEDGEMENT OF RECEIPT OF SUMMONS AND COMPLAINT

I declare, under penalty of perjury, that I received a copy of the summons and of the complaint in the above-captioned matter at _____
(insert address)

_____
(Signature)

_____
(Relationship to Entity/Authority to Receive Service of Process)

_____
(Date of Signature)

United States District Court
For the Eastern District
of Pennsylvania

JAMES C. MELO, JR.	:	Civil Action No. 89-2935
Plaintiff	:	
v.	:	
BARBARA HAFER	:	JURY TRIAL DEMANDED
and	:	
JAMES J. WEST, ESQUIRE	:	
Defendants.	:	

ANSWER AND COUNTERCLAIM OF DEFENDANT BARBARA HAFER

1. Defendant Hafer is without knowledge or information sufficient to form a belief as to the truth or falsity of this averment.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted in part, denied in part. It is admitted that plaintiff was an employee of the Auditor General's Office from 1977 to 1989 but the remaining averments of this paragraph are denied because defendant Hafer is without knowledge or information sufficient to form a belief as to the truth or falsity of these averments.

7. Defendant Hafer is without knowledge or information sufficient to form a belief as to the truth or falsity of this averment.

8. Denied. It is averred on information and belief that plaintiff's promotion to Field Auditor III was purchased by virtue of a payment made by "Reds" Barbone to John Kerr, a former employee of the Department of Auditor General of Pennsylvania and a convicted felon, currently serving time in prison for his related, unlawful activities.

9. Admitted.

10. Admitted.

11. Defendant Hafer is without knowledge or information sufficient to form a belief as to the truth or falsity of this averment. By way of further answer, defendant Hafer states that this so called "investigation" was delegated by Mr. Bailey to James L. McAneny, who performed said "investigation" despite a conflict of interest arising from his prior association with the law office of Calvin Lieberman, at the same time that Lieberman represented John Kerr in the criminal investigation of Kerr for the job-buying scheme in the Auditor General's Office for which Kerr eventually went to prison and McAneny's participation in the cover-up of this job-buying scheme which occurred during the Benedict administration.

12. Defendant Hafer is without knowledge or information sufficient to form a belief as to the truth or falsity of this averment.

13. Admitted.

14. Defendant Hafer is without knowledge or information sufficient to form a belief as to the truth or falsity of this averment.

15. Defendant Hafer is without knowledge or information sufficient to form a belief as to the truth or falsity of this averment.

16. Admitted.

17. Denied. Mr. West did not provide defendant Hafer with any such list prior to defendant Hafer's inauguration as Auditor General.

18. Defendant Hafer is without knowledge or information sufficient to form a belief as to the truth or falsity of this averment. By way of further answer, defendant Hafer denies that such list was provided prior to her inauguration.

19. Denied.

20. Denied. Defendant Hafer received no such list or information.

21. Admitted.

22. Admitted.

23. Admitted.

24. Admitted.

25. Denied.

26. Denied. Subsequent to the election defendant Hafer and representatives from her office conducted an investigation in regard to the job-buying scheme.

27. Denied. By way of further answer, defendant Hafer avers that she had in her possession on February 1, 1989, extensive information learned as a result of the investigation referred to in paragraph 26.

28. Denied. The firing of plaintiff was not the result of joint, concerted and conspiratorial conduct between defendant Hafer and defendant West to create a campaign issue but instead, was the result of an investigation and a commitment to eliminate all public employees who had purchased their jobs as a result of the illegal job-buying scheme for which Benedict and Kerr are serving prison terms.

29. Denied as a conclusion of law to which no responsive pleading is required.

30. Admitted in part, denied in part. It is admitted in part that the Department of Auditor General has a policy procedure manual, copies of various sections of which were attached to the plaintiff's complaint. It is denied as a conclusion of law to which no responsive pleading is required that this manual provides the sole mechanism for disciplining, demoting or suspending employees.

31. Denied as a conclusion of law to which no responsive pleading is required. It is further denied because at all times, defendant Hafer complied with the requirements of due process and all applicable laws and regulations.

32. N/A.

33. Denied as a conclusion of law to which no responsive pleading is required.

34. Denied as a conclusion of law to which no responsive pleading is required.

35. Denied as a conclusion of law to which no responsive pleading is required. By way of further answer, defendant Hafer denies that plaintiff's firing was because of political affiliation as defendant Hafer was unaware of plaintiff's political affiliation.

36. Denied as a conclusion of law to which no responsive pleading is required. By way of further answer, defendant Hafer did not disseminate any statement identifying plaintiff.

37. Denied as a conclusion of law to which no responsive pleading is required. By way of further answer, defendant Hafer engaged in no conspiracy with Mr. West, was not provided with a list of names prior to her inauguration as Auditor General and at all times, acted solely in the public interest.

38. Denied. Defendant Hafer did not deprive plaintiff of his civil rights. Defendant is without sufficient knowledge to form a belief as to the truth or falsity of the remaining averments of this paragraph.

39. Denied as a conclusion of law to which no responsive pleading is required. By way of further answer, defendant Hafer avers that plaintiff was properly the subject of discipline, demotion, suspension and/or dismissal because his job was purchased as part of the job-buying scheme for which former Auditor General Benedict and his deputy John Kerr have gone to prison.

40. Denied. Defendant Hafer did not act in concert or conspire with anyone to impede, hinder, obstruct and/or defeat the due course of justice by dismissing plaintiff or any other employees following her inauguration as Auditor General. Defendant Hafer fired employees whose jobs were purchased as part of the job-buying scheme and these dismissals complied with due process and all applicable regulations.

41. Defendant Hafer is without knowledge or information sufficient to form a belief as to the truth or falsity of this averment.

42. N/A.

43. Denied as a conclusion of law to which no responsive pleading is required. By way of further answer, defendant Hafer avers that the firing of plaintiff was not motivated by an evil motive or intent and was not in wanton disregard of plaintiff's constitutional rights but was part of defendant Hafer's efforts to remove persons from the office of Auditor General who had purchased their jobs as part of the illegal job-buying scheme.

44. N/A.

45. Denied as a conclusion of law to which no responsive pleading is required.

46. N/A.

47. N/A.

48. N/A.

49. N/A.

50. N/A.

51. N/A.

52. N/A.

53. N/A.

54. N/A.

55. N/A.

56. N/A.

57. N/A.

58. N/A.

59. N/A.

60. N/A.

61. N/A.

AFFIRMATIVE DEFENSES

1. The Complaint fails to state a claim upon which relief can be granted.

2. Plaintiff's claims are barred by the doctrines of waiver and estoppel.

3. Plaintiff failed to mitigate his damages.

4. Plaintiff's punitive damage claims are invalid and improper and violate the United States and Pennsylvania Constitutions.

5. Plaintiff's claims are barred by the doctrine of unclean hands.

6. Plaintiff's claims are barred by the Eleventh Amendment.

7. Plaintiff's claims are barred by the doctrine of qualified immunity.

8. Plaintiff's claims are barred by the doctrine of exhaustion and remedies.

9. Plaintiff's claims are barred because plaintiff was provided with sufficient due process by virtue of the procedures provided by applicable laws and regulations pertaining to employees of the Auditor General.

10. Plaintiff's claims are barred for lack of jurisdiction.

11. Plaintiff's claims are barred because service of process was improper.

WHEREFORE, defendant Hafer requests that the Complaint be dismissed with prejudice and judgment be entered in favor of defendant Hafer.

COUNTERCLAIM

Defendant and counterclaim-plaintiff, Barbara Hafer, through her undersigned attorneys, hereby counterclaims against James Melo, plaintiff and counterclaim-defendant.

1. Counterclaim-plaintiff repeats and realleges each of the admissions, denials and averments set forth in the foregoing answer as if they had been set forth herein in their entirety.